SUPREME COURT, U. S.

# In the Supreme Court

OF THE

## United States

OCTOBER TERM, 1966

No. 1164

SAUL LANDAU,

*Petitioner,*

vs.

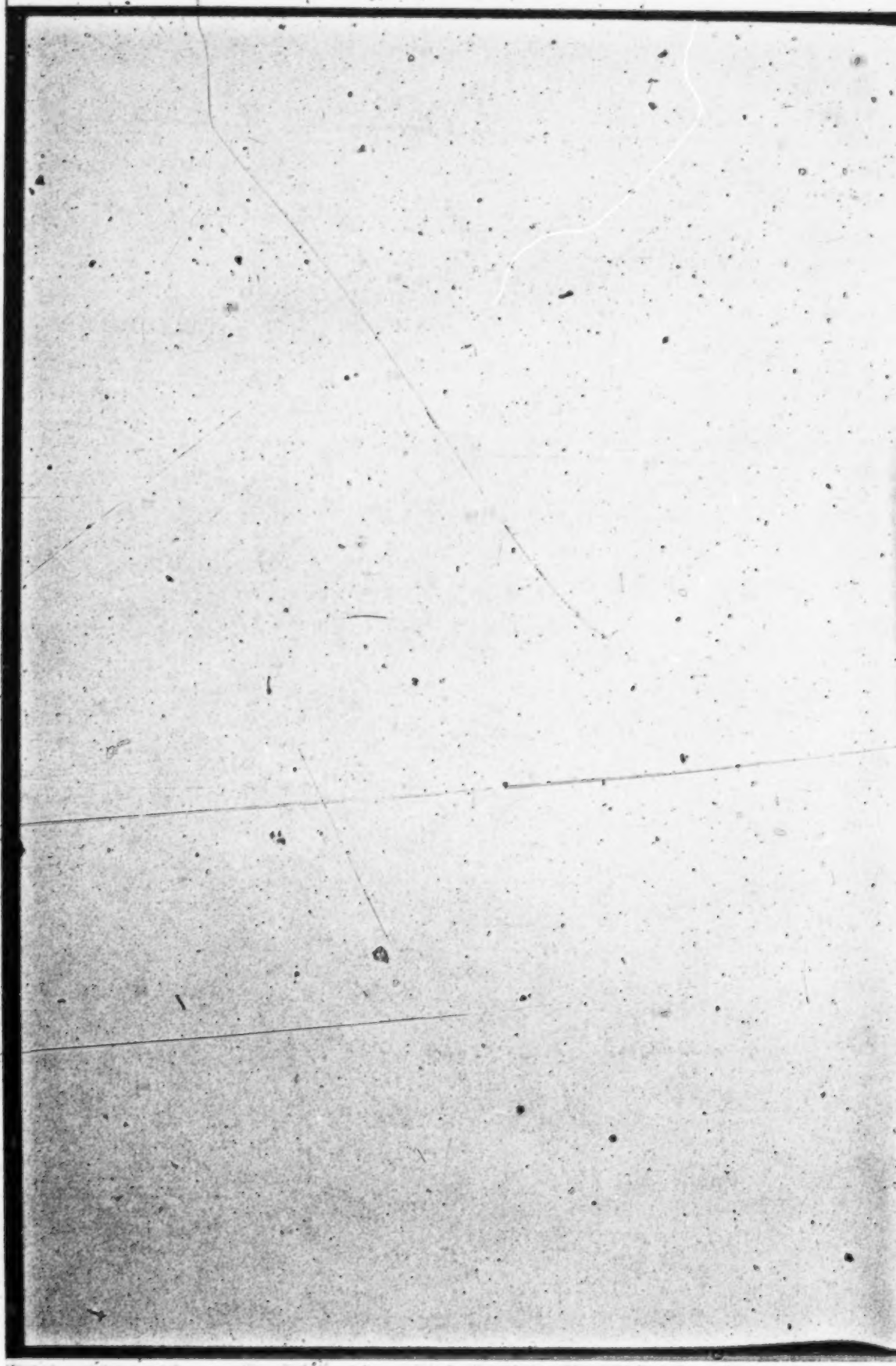
ADDISON FOOTHILL, CHIEF OF POLICE, BERKELEY, CALIFORNIA, EARL BERKFIELD, THE POLICE DEPARTMENT OF THE CITY OF BERKELEY, AND THE CITY OF BERKELEY, a municipal corporation,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeal of the State of California,

First Appellate District, Division Two



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*Respondents.*

## PETITION FOR WRIT OF CERTIORARI
## to the Court of Appeal of the State of California, First Appellate District, Division Two

Petitioner seeks a writ of certiorari to review the judgment of the Court of Appeal in the above case filed October 24, 1966. Hearing was denied by the Supreme Court of California on December 21, 1966.

## OPINIONS BELOW

This case was commenced in the Superior Court for the County of Alameda and the trial Court's unreported Memorandum, Findings, and Judgment will be found in Appendix A and Clerk's Transcript ("C. T.") 94-107. The opinion of the Court of Appeal is reported at 245 A.C.A. 872, 54 Cal. Rptr. 177, and reproduced as Appendix B to this petition. The order of the Supreme Court of California denying a hearing by a vote of 4-3 is unreported and is part of the record certified to this Court.

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## JURISDICTION

This Court has jurisdiction to hear this cause under 28 U.S.C. sec. 1257 (3) since in all courts below the rights and privileges of petitioner under the Freedom of Speech protections of the First and Fourteenth Amendments have been set up and claimed. The decision of the Supreme Court of California denying a hearing after a timely petition was made and entered on December 21, 1966.

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## QUESTIONS PRESENTED

1. In deciding the issue of whether a film may be banned as "obscene," are the trial and appellate Courts free to disregard the unanimous testimony of all witnesses and experts that the film possessed sig-

nificant social and artistic importance, because, in the opinions of the judges of these Courts, the film is utterly without such importance?

2. Was the Court of Appeal correct in holding that the facts that petitioner showed the film on a "commercial" basis and earned "substantial" amounts of money from its exhibit were sufficient, by themselves, to allow the application of the "pandering" test of *Ginzburg v. United States*, 383 U.S. 463?

3. Is Genet's film "Un Chant d'Amour" "obscene" under all conceivable circumstances and can California ban its exhibition under all conceivable circumstances?

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## LAWS INVOLVED

First Amendment, Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

California Penal Code, sec. 311:

> [Definitions.] As used in this chapter:
>
> (a) "Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters

and is matter which is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means having knowledge that the matter is obscene.

California Penal Code, sec. 311.2:

[Sale or distribution, etc., of obscene matter: Penalty.] Every person who knowingly: sends or causes to be sent, or brings or causes to be brought into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

California Penal Code, sec. 311.8:

[Defense.] It shall be a defense in any prosecution for a violation of this chapter that the act charged was committed in aid of legitimate scientific or educational purposes.

## STATEMENT

**A. Genet and his film.**

The French playwright and author, Jean Genet,[1] wrote and directed the film "Un Chant d'Amour" in 1950. It is a silent film of 30 minutes' duration. Its theme is the real and dream worlds of prison inmates. The artist feels that the fantasy life imagined by the prisoners is a significant aspect of their existence. He intersperses views of this fantasy life with the "real" lives of the prisoners in a manner which purposefully blurs the distinction. Thus, although the prisoners are in reality securely locked in heavily barred cells in isolation, a sequence showing two prisoners running through a field could either be their actual conduct after an escape, or a fantasy episode of one of the prisoners.

With the use of such ambiguity[2] as well as the pointed avoidance of direct statement by making his film silent in the age of sound, the artist has widened the subject of the film far beyond prison life to speak meaningfully about the pains of human isolation and

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[1]Genet is the subject of a biography by one of the world's most renowned men of letters, Jean-Paul Sartre. This volume, "Saint Genet" (George Braziller, Inc., 1963; also a Mentor paperback) is a closely reasoned, highly laudatory study of the man and his works. A bibliography of the works of Genet and the major works about Genet and his writings is found in Appendix C to this petition.

[2]Books of literary criticism of the highest caliber emphasize the literary uses of ambiguity. See William Empson, "Seven Types of Ambiguity," (New Directions, 1947); C. K. Ogden & I. A. Richards, "The Meaning of Meaning," (Harcourt Brace, 1956); R. P. Blackmur, "The Double Agent," (Peter Smith, 1962); Cleanth Brooks, *The Language of Paradox* in Barnet (Ed.) "The Study of Literature," (Little-Brown, 1960).

the need for human love. As is frequently the case with Genet, he has chosen to make these statements in the context of the most degraded and "unworthy" elements of our society. In "Un Chant d'Amour," he uses prisoners and a sadistic prison guard; in a novel, "Thief's Journal," he uses petty underworld characters and homosexuals; in a play, "The Balcony," he uses corrupt public officials and inmates of a house of assignation. Genet finds that existing in these dregs of human society are the redeeming qualities of love and compassion. He tells us that when we accept this we can better accept our own humanity, no matter what our position in life.

There is no coyness in the film; when Genet wishes to inform his audience that men isolated in prison cells resort to masturbation, he shows it happening. However, under Genet's direction the sexual acts depicted far transcend their sexual nature; they are not ends in themselves (as sex acts are treated in pornography[3]) but a means to communication of ideas far removed from sexual gratification. For this reason, the film is neither erotic nor pornographic but merely graphic in its treatment of a segment of life.

We are not prepared to agree with the opinion of the Court of Appeal (Appendix B) as to the kinds of sexual acts depicted in "Un Chant d'Amour" or to

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[3]See Marcus, "The Other Victorians" (Basic Books, 1964), p. 281; see also pp. 278-80, 285-86; Gebhard, et al., "Sex Offenders" (Harper & Row, 1965), pp. 669-678. A very helpful opinion dealing with the treatment of shocking sexual scenes in a film is found in *United States v. One Carton, etc., Entitled "491"*, 367 F.2d 889 (2d Cir. 1966).

their frequency, "intensity" or characterization as "perversions." Nevertheless, we must say that the "average man," if he chose to see this film, and if he did not have access to the views of the expert witnesses who testified in this case, might believe that its dominant theme is a "shameful" interest in sex. The film is simply not intended for the "average man;" it is intended for intellectually active and artistically attuned persons. This is the audience petitioner desired to reach[4]; the film's silence, short duration, poetic ambiguity, and uncompromising point of view guarantee that it will never have commercial distribution or mass appeal. The fact that an "average man" may be struck by the sexual candor of the film and be blind to its deeper meanings, is no sufficient reason to prevent communication of these meanings to those who are prepared to accept them.[5] If we are to use the test of *Mishkin v. New York*, 383 U.S. 502, 509, the "intended and probable recipient group," then it is

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[4]Petitioner's showings of "Un Chant d'Amour" were open to the public but publicized only among special audiences, i.e., university students and faculty, members of institutions such as The Center For The Study of Democratic Institutions, and audiences at theatres specializing in foreign films. See *infra* at p. 20.

[5]That the deeper meanings are in the film must be conceded from the unanimous testimony of the expert witnesses. Their testimony is discussed, *infra*, pp. 10-15. The Court below seemed to believe that these experts had to agree on "a particular story line" before the film could be said to have social importance. It reasoned that this was an important factor in redeeming "Lady Chatterly's Lover" in *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 and "Anatomy of a Murder" in *Columbia Pictures Corp. v. City of Chicago*, 184 F.Supp. 817. See App. B, p. xxvii, *infra*. This narrow view of artistic experience is regrettable and certainly conflicts with accepted canons of literary criticism; see note 2, *supra*. We doubt that only material telling a traditional "story" is protected by the First Amendment.

clear that those to whom the film was shown do not see anything "shameful" in the film's treatment of sex. Nor is the treatment of sex more "candid" than customary among people familiar with current trends in art, literature and motion pictures, although it certainly is more "candid" than the neighborhood movie.[6]

Petitioner makes these statements because he does not want the Court to think that this is an innocuous film; it is provocative of thought, striking in beauty and image, and stunningly frank in its search for the truth. Those whose minds are fixed on the "dirtiness" of man's sexual nature might find this a pornographic film; those who are interested in deeper questions of man's existence will see its treatment of sexual themes to be a necessary part of the study of man.

**B. The facts of the case.**

Petitioner obtained the right to show the film from its New York distributor as a means for fund-raising for a nonprofit theatrical group of which he was an officer (R.T. 19-20). He testified that he was familiar with the works of Jean Genet and interested in everything the artist created (R.T. 21). The case was commenced in the Superior Court for the County of Alameda by an action for declaratory and injunctive relief brought by petitioner to protect his right to show "Un Chant d'Amour." The trial of the action established that respondent police officials had threat-

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[6] We think that the candor of the film removes it from the fantasy world of romance and sex so often depicted in popular culture. To the extent that unreality about sex is a hallmark of pornography, "Un Chant d'Amour" is free of the taint.

ened to arrest any person showing the film in the City of Berkeley on the ground that it was "obscene" and its showing would violate sec. 311.2 of the Penal Code. Petitioner sought a declaration that the film was not "obscene"[7] and an injunction to protect his right to show the film. For the purposes of injunctive relief, affidavits of seven experts concerning the artistic merit of "Un Chant d'Amour" were filed with the Court and made part of the record. The experts were Juris Svendsen, theatrical director and professor at the University of California (C.T. 11-14); Pauline Kael, writer and film critic for *The New Republic* (C.T. 17-19); James Kerans, film critic, professor and director (C.T. 20-24); Mark Linenthal, professor and poetry critic (C.T. 25-26); Herbert Blau, director, professor and theatre critic (C.T. 27-32); Irving Saraf, television director and film maker (C.T. 33-34); and Tony Richardson, director and producer of films and stage plays (C.T. 44-45).

These affidavits unanimously supported the great social value and artistic merit of the film. No counter-affidavits were filed. At the trial of the action, respondents introduced no testimony whatsoever, preferring to believe that the film spoke for itself. Petitioner presented the testimony of five expert witnesses on social and artistic value and two additional expert witnesses on the subject of penology. The testimony of these witnesses unanimously supported the artistic and so-

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[7]Such relief is available in California Courts, *Zeitlin v. Arnebergh*, 59 Cal.2d 901.

cial value of the film. To give brief excerpts,[1] Dr. Bernard Diamond, psychiatrist and professor of law and criminology, testified (R.T. 215, et seq.):

> A. It was my opinion that the Genet film was an exceedingly bold, rather shocking, presentation of what is to me a most significant social problem, that is, the problem of sex in prison. I believe there were two dominant themes in the motion picture which have a very important social implication and significance in the field of criminology and penology.
>
> The one theme was the element of perversity, sexual fantasy, masturbation, homosexuality, that was portrayed in the film as being a consequence of the isolation, imprisonment, deprivation process, that goes on in every prison. The other theme was the effect upon the guard. [R.T. 218.]
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> • • •
>
> Yes, I would very much like to have this film available to me. I teach several courses, some in the School of Criminology, some in the School of Law, in which we deal less with the practical aspects of the law, as we deal with the theory of punishment, the effect of prisons, or rehabilitation and social functions of the administration of criminal justice. As a psychiatrist, I would say there is a very heavy emphasis on the psychology of criminology and the psychology of our prison system. What does it really do to individuals? And this is not easy to communicate to students in a way which is meaningful, which carries a

[1] These excerpts are a fair summation of the full opinions of the expert witnesses. In no case did cross-examination change or weaken these opinions.

heavy impact compatible with the emotional charge which is subject to making them care. And this film, I think, would be a very useful teaching device for such students. [R.T. 220.]

Susan Sontag, novelist and film critic, testified (R.T. 155, et seq.):

A. I think it is a very interesting film from both a historical point of view as part of the history of film and as a work standing in its own right. It is very beautifully made. It is well-photographed. It is a work by a terribly important writer. Everything he does is of interest. [R.T. 157-158.]

Professor Jackson Burgess, novelist and film critic, testified (R.T. 146, et seq.):

. . . I think simply in technique, the photography, the editing, the entire technical side of the film, illustrates beyond any doubt at all a very serious and quite sophisticated experimentation in form and an attempt to find and exploit the appropriate method. This I take as evidence of a very serious intent, that is to say, interest in the medium of the film as an artistic medium. [R.T. 148.]

Jan Marinissen, prison counsellor, testified (R.T. 198, et seq.):

Q. Taking into account your experience in counselling prisoners and listening to their problems and what you have observed yourself inside San Quentin and other institutions, do you have an opinion as to whether "Un Chant d'Amour" accurately portrays conditions in prisons?

A. I think it portrays accurately situations in prison in certain instances, yes.

Q. Could you tell us what those instances are?

A. For instance, where the person is completely isolated from any contact with fellow prisoners, for instance, to give an example of the tattoo which appeared on the arm of one of the prisoners in the movie, so many of the prisoners, they wear tattoos, and they usually are tattoos which are highly sexual, with sexual orientation. I think the agony, the despair, which is depicted in the movie is definitely reality.

Then, I remember another scene of the movie which was very beautiful. That is the one where the prisoners are in complete isolation. One employs any means one can find to come out of one's isolation and try to establish a relationship with another person. And I thought—you remember the scene where there were two prisoners communicating by means of a straw, and one tries all kinds of means to get out of one's isolation and where the smoke becomes the way in which they are having a human relationship. [R.T. 209-210.]

Professor Mark Linenthal, poetry critic, testified (R.T. 130, et seq.):

A. It seems to me an important work of art.

Q. And why do you say it is an important work of art?

A. Well, it seems to me that it is a film which deals with an important human subject. That subject is the relation between the outcast individual and society, that society which is officially expressed by our public institutions. It deals with the relation between the outcast and this, what

shall I call it, official society. The film sets in opposition to each other two realms, two areas of experience, which in the course of the film proceed to interpenetrate each other.

Let me say a word about these two realms. The first is a private, subjective world of masturbatory dream, often called the world of imagination. The second is the public world of objective fact. This is the world of prison cells, of prison walls, and prison bars. The first of these two worlds or realms is a world of solitude which is imposed upon the individual by the second world, which is the world of official morality.

In the course of the film the hell of solitude to which official society assigns its criminal element, this hell of solitude strikes back at its declared enemy. There is—and this is what I think puts the film in the great romantic tradition, and in the tradition of the romantic criticism of society—there is a kind of triumph of imagination over the barriers erected by social morality. [R.T. 137-138.]

Irving Saraf, television director and film maker, testified (R.T. 116, et seq.):

A. I think definitely it has artistic value because it deals with one of the main problems that human beings face in society, the problem of love and contact with other human beings.

* * *

The Witness: A. I would start with one of the most important criteria and that is the relevancy. The subject matter is relevant. It is something that is very basic, human feeling. I think that in this picture, this being the object of the

film, it was carried out well. I mean, I think the film has achieved its objective. It did portray that feeling. From a technical point of view, I think the film has used very beautifully, very austere, camera work.

* * *

I thought the film was pretty compact in what it had to say. I felt every image has a particular purpose, which is more than I can say for most films I see.

* * * The visual symbol of the bouquet of flowers being passed is made quite obvious since it opens and closes the film. It is a very meaningful symbol about the whole need to reach to another human being. The visual symbol of the passing of the pipe between the two cells, the passing of the smoke between the two cells, again, is a very strong symbol of the need for human contact under any circumstances, the need for human love under any circumstances. I thought it was beautifully portrayed. [R.T. 123, 124, 125-126.]

James Kerans, film critic and director, testified (R.T. 54, et seq.):

Q. Do you think "Un Chant d'Amour" has value as a work of art?

A. Absolutely; yes.

Q. Could you tell us the reasons for that opinion?

A. Of course, this is a notoriously difficult kind of question to answer. I think it begins in my training with formal qualities; and I think this movie has very, very highly developed formally beautiful qualities. I don't know exactly what people mean by this. They are always quar-

> reling about it. Finesse, self-containment, a certain newness of subject material, the grace in the handling. I suppose ultimately you know it by your response to it. You say that it is beautiful and in every one of these respects I would say the movie is a fine work of art. It is not great; it is very fine. [R.T. 74.]

One expert was called by the trial judge, but he did not see the film and expressed no opinion on it (R.T. 176, et seq.).

Despite this unanimous and uncontradicted testimony, the trial Court denied the injunction and declared that the film was obscene, that its showing under any circumstances would be a violation of Penal Code sec. 311.2 and that the defense under Penal Code sec. 311.8 was not available for "Un Chant d'Amour." (App. A, pp. xi-xii; C.T. 85, 97, 103, 105-106.) In the trial Court's memorandum opinion, the expert testimony was said to be an "aid" to the Court in making its decision (App. A, p. iii; C.T. 95), but the trial Court felt free to, and did, reject the opinions of all the expert witnesses (App. A, p. iv; C.T. 96).

In a unanimous decision, the Court of Appeal affirmed the trial court (Appendix B), explicitly stating that the film must be banned in California. A petition for hearing in the Supreme Court of California was denied, three Justices dissenting. This petition follows.

## REASONS FOR GRANTING CERTIORARI

### A. THE GINZBURG TEST WAS WRONGLY APPLIED IN THREE RESPECTS.

**1. The Ginzburg test cannot support a total ban on the work.**

This was an action for declaratory relief that "Un Chant d'Amour" did not meet the constitutionally-required definition of "obscene." The trial court ruled that it did meet this definition and the Court of Appeal affirmed, the latter, relying on its concept of the holding of *Ginzburg v. United States,* 383 U.S. 463, to support its decision. (See Appendix B, p. xxix.) However the *Ginzburg* criteria were never intended to be used in deciding the question of whether a book or film is "obscene" in the abstract, i.e., under all circumstances and conditions. *Cf. United States v. 31 Photographs,* 156 Fed.Supp. 350 (1957).

Chief Justice Warren's concurring opinion in *Roth v. United States,* 354 U.S. 476, which seems to be the origin of the *Ginzburg* holding, explicitly focused on the particular conduct of the disseminator as the significant element. The Chief Justice wrote:

> The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting. (354 U.S. at 495.)

Mr. Justice Brennan acknowledged the influence of this concurring opinion in his opinion for the Court in *Ginzburg* (383 U.S. at 475.) The salient feature of

the *Ginzburg* decision is the discussion of the conduct of the defendant in placing great emphasis on the sexually provocative aspects of his publications which, it was assumed, did not meet the definition of "obscene" in the abstract. Mr. Justice Brennan wrote:

> . . . . the fact that each of these publications was created or exploited entirely on the basis of its appeal to prurient interests [footnote omitted] strengthens the conclusion that the transactions here were sales of illicit merchandise, not sales of constitutionally protected matter. [footnote omitted.] A conviction for mailing obscene publications, but explained in part by this element, does not necessarily suppress the materials in question, nor chill their proper distribution for a proper use. Nor should it inhibit the enterprise of others seeking through serious endeavor to advance human knowledge or understanding in science, literature or art. (383 U.S. at 474-75.)

It is clear that the Court below neither understood nor heeded this explanation of the *Ginzburg* holding.

The law left standing in California by the decision below is that the conduct of a particular distributor at a particular time can result in a ruling that a particular film is "obscene" under all circumstances. The result of this ruling is that any exhibition of "Un Chant d'Amour" in California would be a criminal offense. It could not be exhibited to a group of film experts interested in its technical perfection; it could not be exhibited to a group of lawyers and penologists interested in penal reform, and it could not be exhibited to a group of scholars interested in every-

thing Jean Genet has done, whether good or bad. (See Appendix C.) Such a result is not compatible with the freedom of communication protected under the First Amendment. We are confident that a majority of this Court did not intend that the *Ginzburg* rule apply where the question concerns the total banning of a film under all circumstances.

**2. The Ginzburg rule was improperly stated by the Court below.**

The Court of Appeal held that the "pandering" test was applicable in this case because petitioner "commercially exploited" the film and "earned substantial amounts from its distribution in the Bay Area"[9] (Appendix B, p. xxix). On this basis alone the *Ginzburg* decision "further propelled" (Appendix B, p. xxix) the Court of Appeal to its decision that "Un Chant d'Amour" is utterly without redeeming social importance. By this reasoning the Court of Appeal stands in direct opposition to the *Ginzburg* holding. The *Ginzburg* Court explicitly held that such criteria were not evidence of pandering:

> *No weight* is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed but do not hold cannot themselves be adjudged obscene in the abstract; to sanction consideration of this fact might indeed induce self-censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment. (383 U.S. 463, 474, emphasis added.)

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[9] In fact, the evidence showed that petitioner had earned $1200 from the film in four months of distribution, R.T. 28.

If left to stand, the dangerous ruling of the Court of Appeal will leave commercial gain an element to be held against a bookseller or film distributor in California. It need not be documented that it is through the promise of commercial gain that books and films receive broad distribution. To make this factor a part of the "pandering" test, rather than exploitation of prurient content as was intended by *Ginzburg,* will be to induce self-censorship and discourage distribution of controversial books and films in violation of First Amendment guarantees.

**3. The evidence in this case does not support the application of the Ginzburg rule.**

Other than the factors mentioned in the preceding paragraph, which we believe are not germane, there was no evidence in this case regarding any exploitation of possible prurient interest in "Un Chant d'Amour." The only testimony regarding the manner of the film's distribution and publicity came from petitioner. Respondents offered no testimony nor did their answer (C.T. 8-10) claim that the film was exploited for its alleged prurience. Nor did the trial Court opinion (Appendix A; C.T. 94-98) or findings (Appendix A; C.T. 100-104) mention this factor.

Petitioner testified (R.T. 18, et seq.) that he worked for a San Francisco theatrical company and was engaged in raising money for the company by various benefits, one of which was the showing of "Un Chant d'Amour." He testified that he was familiar with the reputation of Genet and considered him one of the world's greatest playwrights (R.T. 20; see Appendix

C). Petitioner had received the film for distribution on the understanding that it would be used for benefits and that it would not be shown at "commercial movie houses" as contrasted with "art movie houses." (R.T. 22.) He further testified that the film was not advertised in the papers (R.T. 40) and that it was shown to audiences at universities and persons connected with specialized institutions such as The Center For The Study of Democratic Institutions at Santa Barbara. (R.T. 23.) The title of the film is not provocative nor was it translated from the French. In short, none of the factors which established exploitation of the material in *Ginzburg* are present here and there is utterly no evidence of "pandering." In the hands of this petitioner the film had redeeming social importance and the mere risk that the film might be exploited by someone else cannot provide a basis for its banning under all circumstances. See *A Book v. Massachusetts*, 383 U.S. 413, 415. (Opinion of Mr. Justice Brennan.)

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B. MATERIAL OF UNDISPUTED REDEEMING SOCIAL IMPORTANCE HAS BEEN CENSORED.

It is now settled that whether material is protected by the First Amendment, must be decided by an independent constitutional determination by appellate Courts [illegible] cannot simply be left to the trier of fact. See *A Book v. Massachusetts*, 383 U.S. 413, *Jacobellis v. Ohio*, 378 U.S. 184, 190. This has generally meant that judges look at the evidence and the material accused and make up their own minds. See, e.g.,

*Kingsley Pictures v. Regents*, 360 U.S. 684, *Zeitlin v. Arnebergh*, 59 Cal.2d 901. We are now faced with the question of how far that "independent judgment" can go. Can a group of judges, on the "evidence" obtained solely by their own viewing of a film or reading of a book, decide that there is an utter lack of social importance despite unanimous and forceful expert testimony to the contrary?

Both Courts below answered this question affirmatively. The judges viewed the film, could not see any social importance, felt free to disregard the unanimous expert testimony to the contrary, and banned the film. Whence comes this power? Petitioner believes that the First Amendment does not permit judges to be the final arbiters of what has social value and thus can circulate in our society. Petitioner believes that judges are required to rely upon evidence for their conclusions. The judges who made the decision on "Un Chant d'Amour" were never examined as to their competence in literary or cinematic communication. They have turned themselves into witnesses without giving the parties any opportunity to confront the evidence upon which they base their findings.

This case is one as to which there was no factual dispute. All the evidence, which petitioner has summarized above, supported the film's great social importance. It came from persons highly qualified to present their opinions who submitted themselves to cross-examination. Courts making judgments in the First Amendment field have the power and the duty

to make independent judgments *of the evidence*, but no power to make independent judgments *without evidence*. The ruling of the Court below to the contrary, brings chaos to the area of freedom of expression and leaves every communication open to censorship regardless of the persuasive case a defender of that communication can present for its constitutional protection.

Even if the opinion of the Court below represents that of a great majority of our population, can this majority view prevent a minority from viewing "Un Chant d'Amour"? Certainly there is no way of denying that Genet's film has meaning and significance for some elements of our population. No one has suggested that the experts who testified as to its merits were lying; the only charge which has been made against these witnesses is that they could not agree on the film's dominant theme. (Appendix B, p. xvii.) Even if this charge is true—which petitioner disputes—it has no importance. What is important is that for each of these witnesses the film had social significance. The ruling of the Court below bans the film and deprives them of the opportunity to see it and to show it to others for whom it will have social significance. The Court below has interdicted that social value on the sole basis of its statement that it does not exist. This is censorship in its most virulent and dangerous form.

## CONCLUSION

This is an important case for many reasons. At stake is the proper application of the *Ginzburg* test and the "independent judgment" rule by state Courts throughout the country. Also at stake is whether we are strong enough and brave enough to face the truth about ourselves as seen through the understanding of one of the great artists of our time.

It is respectfully submitted that certiorari should be granted to the Court below.

Dated, San Francisco, California,
March 9, 1967.

Respectfully submitted,

MARSHALL W. KRAUSE,
Staff Counsel, American Civil Liberties Union of Northern California,
NEIL F. HORTON,
*Attorneys for Petitioner.*

ALBERT M. BENDICH,
JOHNSTON & PLATT,
*Of Counsel.*

**(Appendices Follow)**

## Appendix A

In the Superior Court of the State of California
in and for the County of Alameda
Department No. 19
Hon. George W. Phillips, Jr., Judge

No. 345816

Saul Landau,
Plaintiff,
vs.
Addison Fording, Chief of Police, Berkeley; Earl Bergfeld, Director, Special Investigations Bureau of the Police Department, Berkeley; Police Department of the City of Berkeley, California; and the City of Berkeley, California,
Defendants.

**MEMORANDUM OF COURT PREPARED TO ASSIST COUNSEL IN THE HEARING ON THE OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND PROPOSED COUNTER-FINDINGS**

This action is similar in nature to that in *Zeitlin v. Arnebergh*, 59 C.2d 901, in that it sounds in declaratory relief. Plaintiff seeks a declaratory judgment that the film and motion picture "Un Chant

d'Amour" in which he claims to have a financial interest is not "obscene" as the meaning of that word is defined in Penal Code Section 311(a).

As to Issues 3 and 4 as they are set forth in the pretrial conference order, as amended, the Court will find in substance that plaintiff has the right under a lease to exhibit the picture in California and that, as held in the *Zeitlin* case, he is entitled to seek the declatory judgment concerning the picture. The Court's answers to Issues 1 and 2 will hereinafter appear.

Penal Code Section 311(a) reads as follows:

> "(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

Preliminarily, as to the evidence received from psychiatrists, behavioral scientists, social scientists, art critics and other "experts" that the picture is not within the proscription of the statute, the following comments are made. There is a hint in the *Zeitlin* opinion that perhaps such testimony is not admissible in such cases as this (page 911). However, objections to the reception of the evidence were overruled because this Court believes that if Justice Tobriner meant that such testimony was inadmissible, he would have made that abundantly clear. The Supreme Court of the United States has indicated in several opinions

that such testimony is properly admitted. Justice Tobriner was very clear, on the other hand, that "whether the volume (in the instant case the picture) transgresses the standards imposed by the Legislature and by the Constitution" (page 910), is a question to be decided by the Court, not by the jury (in a criminal case) nor by an "expert" or a group of "experts", however distinguished he or they may be in their respective professions of medicine or pedagogy. Accordingly, the testimony received from the witnesses here can serve only to aid the Court whose responsibility alone it must be to decide whether this picture is within the statutory definition of obscenity.

Plaintiff's counsel have ably and exhaustively presented the pertinent legal authorities and it is unnecessary in this brief memorandum to discuss them in detail. The Court has examined them including the very recent *Freedman* opinion of the United States Supreme Court in which that Court remanded the case, holding that plaintiff was entitled to a *judicial* determination at the outset as to the propriety of his material rather than having to go through the protracted delays attendant upon presentation of the question to an *administrative* officer or board and ensuing appeal to the Court from his or its decision. Our California Supreme Court's unanimous opinion in the *Zeitlin* case is, of course, the most helpful and illuminating authority. It appears from plaintiff's complaint that the writer and director of this picture was Jean Genet, a "noted French playwright and author". In *Zeitlin*, Justice Tobriner quotes and refers to various literary books and periodicals and in

this case it seems relevant to note that quite recently Jean Genet has been described as "a professed immoralist and enemy of society; he has no compunction about using pornography, and in fact he once made a pornographic movie." (Title, "Against Pornography" by George P. Elliott in the March 1965 issue of Harper's Magazine, pages 50, 54.) It does not appear that this picture is the movie referred to by Professor Elliott and even if it is, Elliott's opinion cannot be decisive of the question before the Court.

In applying this statute, the Court has carefully considered the exhaustive legal points and authorities submitted by counsel.

It can be noted that the plaintiff's witnesses expressed opinions that the picture was not within the prohibition of Penal Code Section 311(a) because it is "of high esthetic value", or has a redeeming social importance in that it is "an effort to deal with the problem of human isolation and the often cruel nature of social institutions." One playwright and drama reviewer expressed the view that the sequence in which the young Negro is masturbating is one of the sad and lovely things in this imperfect film. It has the flux and power of Oriental art in which the apparently obscene is redeemed by rhythm and form. The Court having viewed the film on more than one occasion does not agree with these expressed opinions.

Having in mind fully the pronouncements of both the United States and California Supreme Courts, this Court cannot find it possible to agree with plaintiff's position or that of his witnesses. While psychia-

trists or social scientists might find the film of some slight academic or clinical interest, the test or definition in the statute is the predominant appeal to the average person. Significantly, one of plaintiff's drama experts asks and answers as follows, referring to one of the acts of masturbation: "Would such an episode be obscene to the average mind? I suspect it would."

Paraphrasing the sentence which appears in *Zeitlin* at the foot of page 921 and the top of page 922, there is present throughout this picture the sadism, masochism, degeneracy and treatment of sex and nudity in a morbid and shameful manner which frequently mark obscenity.

The Court will find in the language of the Code section that to the average person applying contemporary standards the predominant appeal of this motion picture, taken as a whole, is to prurient interest, i.e., a shameful and morbid interest in nudity and sex which goes substantially beyond customary limits of candor in description and representation of such matters and that the picture does not contain matter which recovers for it its position to be constitutionally protected. As to the last preceding clause, the Court has in mind the language of the last paragraph of page 920 of the *Zeitlin* opinion.

This Court feels that the film is nothing more than cheap pornography calculated to promote homosexuality, perversion, and morbid sex practices, and that it falls far short of dealing with homosexuality, perversion, masturbation or sex from the scientific, historical or critical point of view and it is completely lacking

in the exposition of any ideas of social importance. It has no value as literature or art to give it redeeming social importance and thus obtain the benefit of the constitutional guarantees.

The Court's answers to Issues 1 and 2 are therefore in the affirmative. The film is obscene within the meaning of Penal Code Section 311(a) and a showing thereof would be in violation of Penal Code Section 311.2. This Court cannot find that any such showing would be in aid of any legitimate scientific or educational purpose and therefore would not be a defense as set forth in Penal Code Section 311.8.

The Court has viewed the film on more than one occasion and will incorporate in its findings a description of what the picture portrays.

Special findings "a" through "n" requested by plaintiff will either be covered by the findings suggested above or are findings of evidentiary facts and issues as distinguished from findings of ultimate fact. See *Lewetzow v. Sapiro* (1961), 188 Cal.App.2d 841, 844, 48 Cal.Jur.2d "Trial" Section 308.

The Court has made this memorandum to assist counsel in preparing findings of fact, proposed alternate findings of fact, conclusions of law and objections thereto.

George W. Phillips
Judge of the Superior Court.

Dated: March 18, 1965.

[Title of Court and Cause]

## SETTLEMENT OF FINDINGS, etc.

Nature of Proceedings: Action No. 345816

This action continued from Feb. 18, 1965 comes on this day for settlement of Findings. Respective counsel present argument & Court grants certain amendments to the proposed Findings and by stipulation of respective counsel certain other amendments are granted. Counsel for defendant to prepare amended Findings of Fact & Judgment within five days and counsel for plaintiff waives time for or if any objections to amended Findings be made to within five days and this action is continued to April 5, 1965 at 9:15 a.m. for further disposition.

Filed March 2, 1965,
Jack G. Blue, County Clerk.

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[Title of Court and Cause]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on February 10, 11, 15 and 16, 1965, before the court sitting without a jury, Johnston & Platt, by Neil F. Horton, and Albert M. Bendich, appearing for the plaintiff, and Robert T. Anderson and Robert P. Berkman, by Robert T. Anderson, appearing for the defendants; and evidence both oral and documentary having been introduced and the cause submitted for decision, the Court now makes its findings of fact as follows:

## FINDINGS OF FACT

### I

Plaintiff Saul Landau is authorized by Film-Makers' Cooperative, New York, a distributor of the film "Un Chant d'Amour", written and directed by Jean Genet, to exhibit said film in the San Francisco Bay Area; plaintiff and the San Francisco Mime Troupe, an unincorporated association, share the proceeds derived from such exhibitions; said film has been shown in San Francisco and on one occasion it was shown in Berkeley.

### II

Defendant Addison Fording is the Chief of Police of the City of Berkeley; defendant Earl Bergfeld is the Director of Special Investigations Bureau of the Police Department of the City of Berkeley.

### III

Plaintiff sought to show the film in the City of Berkeley; an agent of plaintiff was advised by said defendant Bergfeld that if the film were again shown in Berkeley, it would probably be confiscated and those responsible for its showing would probably be arrested; in so advising plaintiff's agent, defendant Bergfeld acted as agent for, and on behalf of, the Police Department of the City of Berkeley; that these threats of arrest and confiscation of the only print of "Un Chant d'Amour" that plaintiff possessed caused plaintiff to refrain from exhibiting said film in the City of Berkeley.

IV

Following such threat of confiscation and arrest by defendant Bergfeld, plaintiff instituted this action for declaratory relief seeking a declaration that said film "Un Chant d'Amour" is not obscene within the meaning of Section 311(a) of the Penal Code of the State of California and that its exhibition in the City of Berkeley would not be in violation of Section 311.2 of the Penal Code of the State of California; there is a controversy between plaintiff and defendants in that defendants contend that "Un Chant d'Amour" is obscene within the meaning of Penal Code Section 311(a).

V

The material which is the subject matter of this litigation is a silent film of approximately 35 minutes' duration which is lacking in dialogue and text, which appears to have been filmed in 1950. The setting of the film is in an unnamed prison cellblock in an unnamed place. The principal characters are a guard, and four prisoners in single cells. Various additional figures are revealed which may or may not be the original five characters. The film explicitly and vividly reveals acts of masturbation, oral copulation, and infamous crime against nature (sodomy), voyeurism, nudism, sadism, masochism, and sex. These portrayals occupy in excess of half of the footage of the film. The Court finds that it is true that to the average person applying contemporary standards the predominant appeal of the matter, taken as a whole, is to prurient interests, i.e., a shameful and morbid interest in

nudity and sex, which goes substantially beyond customary limits of candor in description or representation of such matters.

VI

That Court finds that the film is nothing more than cheap pornography calculated to promote homosexuality, perversion, and morbid sex practices, and that it falls far short of dealing with homosexuality, perversion, masturbation or sex from the scientific, historical or critical point of view and it is completely lacking in the exposition of any ideas of social importance. It has no value as art or otherwise to give it redeeming social importance and thus obtain the benefit of the constitutional guarantees.

VII

Said film "Un Chant d'Amour" has been viewed by the Court on two occasions and it is obscene within the meaning of Section 311(a) of the Penal Code of the State of California, which reads as follows:

"'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

## CONCLUSIONS OF LAW

### I

This is an appropriate action for declaratory relief.

### II

The film "Un Chant d'Amour" is obscene within the meaning of Section 311(a) of the Penal Code of the State of California, which section is hereinabove quoted.

### III

The exhibition or showing of the film "Un Chant d'Amour" would be in violation of Section 311.2 of the Penal Code of the State of California, which section reads as follows:

> "Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

### IV

There is no matter in the film which would be in aid of any legitimate scientific or educational purpose and therefore plaintiff would not be able to have the defense in any prosecution for a violation of Chapter 7.5, Title 9, Part 1 of the California Penal Code, that the showing of the film was exhibited in aid of legiti-

mate scientific or educational purposes as contemplated by Penal Code Section 311.8.

V

Defendants are entitled to recover their costs of suit.

Dated: March 30, 1965.

George W. Phillips Jr.
Judge of the Superior Court.

Filed, March 30, 1965,
Jack G. Blue, County Clerk.

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[Title of Court and Cause]

JUDGMENT

This cause came on regularly for trial before the Court sitting without a jury, Johnston & Platt, by Neil F. Horton, and Albert M. Bendich, appearing for plaintiff, and Robert T. Anderson and Robert P. Berkman, by Robert T. Anderson, appearing for defendants; and evidence both oral and documentary having been introduced and the Court being fully advised in the premises and having heretofore made and entered findings of fact and conclusions of law.

Now, therefore, it is ordered, adjudged and decreed that the film, "Un Chant d'Amour" is obscene within the mean of section 311(a) of the Penal Code of the State of California, which section reads as follows:

"'Obscene' means that to the average person, applying contemporary standards, the predomi-

nant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

It is further ordered, adjudged and decreed that the showing or exhibition of said film "Un Chant d'Amour" would be in violation of Section 311.2 of the Penal Code of the State of California, which section reads as follows:

"Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

It is further ordered, adjudged and decreed that any person performing any of the acts referred to in Chapter 7.5, Title 9, Part 1 of the California Penal Code with the film "Un Chant d'Amour" would not be able to claim as a defense in any prosecution for a violation of such chapter that the act charged was committed in aid of legitimate scientific or educatiensal purposes as contemplated in Penal Code Section 311.8, which section reads as follows:

"It shall be a defense in any prosecution for a violation of this chapter that the act charged was

committed in aid of legitimate scientific or educational purposes."

It is further ordered, adjudged and decreed that defendants shall recover their costs of suit in the sum of $

Dated, March 30, 1965.

George W. Phillips Jr.
Judge of the Superior Court.

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[Title of Court and Cause]

FINDINGS OF FACT AND JUDGMENT

Nature of Proceedings: Action No. 345816

Action advanced from April 5, 1965 and placed on the calendar this day by order of the Court. Court orders action submitted. Court approved the Findings of Fact and Conclusions of Law as so amended and renders Judgment as per announcement of decision of Feb. 18, 1965.

Respective counsel are notified by mail.

Filed, March 30, 1965.
Jack G. Blue, County Clerk.

## Appendix B

(245 A.C.A. 872)

*In the District Court of Appeal**
*State of California*
*First Appellate District*

DIVISION TWO

1 Civil No. 22,920

Saul Landau,
Plaintiff and Appellant,
vs.
Addison Fording, Chief of Police, Berkeley, California, Earl Bergfeld, Director, Special Investigations Bureau of the Police Department of Berkeley, California; The Police Department of the City of Berkeley, California; and the City of Berkeley, California,
Defendants and Respondents.

OPINION

The only question presented on this appeal is whether the trial court properly found that "Un Chant d'Amour," a film written and directed by Jean

*Renamed "Court of Appeal" by constitutional amendment January 1, 1967.

Genet, was obscene within the meaning of section 311, subdivision (a), of the Penal Code and, therefore, excluded from the constitutional guarantees of freedom of speech and of the press.

The pertinent facts are not in dispute. Appellant, Saul Landau, was authorized by the New York distributor to exhibit the film in the San Francisco Bay Area. Appellant shared the proceeds derived from such exhibitions with the San Francisco Mime Troupe, an unincorporated association. Under his agreement with the New York distributor, appellant was not entitled to exhibit the film at commercial movie houses catering to a general movie audience.

Prior to the instant proceeding, appellant had exhibited the film in Santa Barbara (before an audience comprised mainly of people from the Center for the Study of Democratic Institutions), in San Francisco at several private showings, at San Francisco State College, in several art movie houses in San Francisco, and in Berkeley at Stiles Hall, the University Y.M.C.A. After appellant sought to show the film a second time in Berkeley, his agent was advised by respondent Bergfeld, the Director of the Special Investigations Bureau of the Police Department, that the next time the film was exhibited in Berkeley, it would be confiscated and all persons responsible arrested. In so advising the agent of appellant, respondent Bergfeld acted as the agent of the Berkeley Police Department headed by respondent Fording.

Thereafter, appellant instituted this action for declaratory relief. At the trial of the action, the trial

court, in order to determine the artistic value and social importance of the film, admitted the testimony of seven expert witnesses called by appellant[1] as well as its own expert witness[2] over the repeated objections of respondents who chose not to present any evidence, but argued that the court had to base its conclusions on the film alone. All of appellant's witnesses had different views as to the theme of the film, and while contending it was not hard-core pornography, they agreed that the film should not be shown over television or in commercial motion picture theatres.

The trial court twice viewed the film and found that to the average person applying contemporary community standards, the predominant appeal of the film as a whole was to prurient interests, i.e., a shameful and morbid interest in nudity and sex, substantially beyond customary limits of candor in the description or representation of such matters. The court further found that the film explicitly and vividly revealed acts of masturbation, oral copulation, the infamous crime against nature (sodomy), voyeurism, nudity, sadism, masochism and sex and that it was "nothing more

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[1]The witnesses for appellant were: James Kerans, lecturer on dramatic literature and theory of the University of California, Berkeley; Irving Saraf, director of the film programming for television station KQED; Mark Linenthal, assistant director of the Poetry Center of San Francisco State College; Jackson Burgess, novelist, film critic and professor of English at the University of California, Berkeley; Susan Sontag, novelist and film critic; Jan Marinissen, rehabilitation secretary of the American Friends Service Committee; Dr. Bernard L. Diamond, professor of Criminology and Law at the University of California, Berkeley.

[2]The court called as its own expert witness Dr. Charles W. Merrifield, professor of Social Science and the head of the Social and Behavioral Sciences at California State College, Hayward.

than cheap pornography calculated to promote homosexuality, perversion, and morbid sex practices," that it fell "far short of dealing with homosexuality, perversion, masturbation or sex from the scientific, historical or critical point of view," was completely lacking in the exposition of any ideas of social importance, and had no value as art or otherwise to give it redeeming social importance and thus obtain the benefit of the constitutional guarantees.

Accordingly, the court concluded that: the film was obscene within the meaning of section 311, subdivision (a), of the Penal Code; therefore, any exhibition or showing thereof would be in violation of section 311.2 of the Penal Code, and any person showing the film would not be able to claim as a defense that the exhibition was in aid of legitimate scientific or educational purposes within the meaning of section 311.8 of the Penal Code. This appeal is from the judgment entered in favor of respondents.

While motion pictures, like other forms of expression, are within the ambit of the constitutional guarantees of freedom of speech and of the press (Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495), obscenity is not subject to those guarantees (Roth v. United States, and Alberts v. California, 354 U.S. 476).

Section 311, subdivision (a) of the Penal Code provides: "'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond

customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

The statute was the codification of the definition of obscenity announced by the U. S. Supreme Court in Roth v. United States, supra (Zeitlin v. Arnebergh, 59 Cal.2d 901, 918-919). The section, in substance, prohibits "hard-core" pornography (Zeitlin v. Arnebergh, supra, at p. 919). The U. S. Supreme Court has not yet determined whether Roth and the subsequent cases are limited to "hard-core" pornography.[8] (Manual Enterprises v. Day, 370 U.S. 478, 489). In its most recent opinion dealing with a film, the U. S. Supreme Court said: "We would reiterate, however, our recognition in Roth that obscenity is excluded from the constitutional protection only because it is 'utterly without redeeming social importance,' and that 'the portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.' Id. at 484, 487. It follows that material dealing with sex in a manner that advocates ideas, Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor

[8]Significantly, only in a few cases, notably Manual Enterprises v. Day, 370 U.S. 478, Jacobellis v. Ohio, 378 U.S. 184, and Memoirs v. Massachusetts, 383 U.S. 413, was the court ever required to apply its standards to the materials in question. In all of the other cases, because the issue before the court was the constitutionality of a particular statute, the issue of obscenity of the material itself was either assumed or not discussed.

may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance." (Jacobellis v. Ohio, 378 U.S. 184, at p. 191.)

The Jacobellis opinion also indicated that the applicable contemporary community standard is not that of the local community where the case arises, but a national standard (supra, pp. 192-195). The most recent decisions of the U. S. Supreme Court affirm the requirement that the elements of obscenity defined in Roth must coalesce, that there will be no balancing of "social importance" against the other elements (Memoirs v. Massachusetts, 383 U.S. 413, 419), and announced a new doctrine, namely, that evidence that material was commercially exploited for the sake of prurient appeal to the exclusion of all other values would justify the conclusion that the material was utterly without redeeming social importance (Ginzburg v. United States, 383 U.S. 463, 470-473; Mishkin v. New York, 383 U.S. 502), Ginzburg and Mishkin indicating that apart from the nature of the material, the conduct of the disseminator and the commercial context in which the dissemination occurs are significant.

We first dispose of respondents' contention that the trial court erred in admitting the testimony of the expert witnesses and in failing to base its conclusions solely on the viewing of the film. The question here presented is not one of fact alone but is mixed with a determination of law. (Zeitlin v. Arnebergh, 59 Cal.2d

901 at p. 910). The court must make an independent judgment as to whether the *material involved is constitutionally protected* (Jacobellis v. Ohio, supra, p. 190). In almost every field of the law, expert testimony is permitted on subjects concerning which the judge or administrator has no specialized competence. So here, the lower court properly received evidence to assist in the determination of contemporary community standards as well as the artistic merit and social importance of the film (Smith v. California, 361 U.S. 147 at pp. 157, 166-167).

The principal question is whether "Un Chant d'Amour" satisfies the test of obscenity established by our statute and the decisions of the U. S. Supreme Court. Before exploring the "dim and uncertain" line that often separates obscenity from a constitutionally protected expression (Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66), we give a description of the film which was viewed in its entirety by the justices of this court.

"Un Chant d'Amour" is an 8 mm. silent film of about 30 minutes' duration made in the style of the short silent films of the 1920's and apparently deliberately ambiguous. No music or text accompanies the film. The actors are professionals. The picture was made with artificial lighting on autochromatic film which is blind to red so that almost all of the greys are eliminated. The resultant strong contrasts between dark and light create a particularly visual impact.

The setting is an unnamed prison cell block in an unnamed place. The principal characters are a guard

and four prisoners. At the outset, the guard is walking outside the prison walls. Each prisoner is alone in his cell engaging in various acts of self-love and masturbation. The prisoners are also shown communicating with each other by knocking on the walls and by the passage of a straw through a hole in the thick wall between the cells, and the blowing of smoke through a straw. Two of the prisoners are clearly involved in a homosexual relationship. The guard in the course of his duties looks into each of the individual cells through peep holes and observes the prisoners. Their acts of sexual perversion and particularly the conduct of one hairy-chested prisoner arouses the guard's voyeuristic and latent homosexual tendencies. The film reaches a climactic ending in a sadistic beating of the hairy-chested prisoner by the algolagnic guard. In the last scene, the guard is again walking outside the prison wall.

In the last half of the film, the realistic scenes in the prison are interspersed with three series of brief recurring fantasy scenes that may or may not be the fantasy of some or only one of the characters. In the first series, two hands emerge from their individual barred cell windows and one hand attempts unsuccessfully to throw a garland of flowers to the other. Toward the end of the film, the garland is caught. In the second series of fantasy scenes (most likely those of one or both of the prisoners who are homosexually involved with each other), the prisoners are playing together in a romantic sunlit wood. During the third series (most likely those of the guard during

the beating), two male heads are seen passionately kissing; two male torsos appear in various positions depicting fellatio, sodomy and oral copulation. The fantasy scenes increase in intensity during the film. At several points, the fantasy and the reality appear to merge; for example, in one scene, a prisoner puts on his jacket; he is next seen wearing the jacket in the sentimental woods fantasy. The portrayals of sexual perversion occupy in excess of half of the footage of the film.

It should be readily apparent from the preceding description that the film goes far beyond customary limits of candor in offensively depicting certain unorthodox sexual practices and relationships. Thus, the instant film is clearly distinguishable from Manual Enterprises v. Day, 370 U.S. 478,[4] and similar cases such as Times Film Corp. v. City of Chicago, 355 U.S. 35, and One, Inc. v. Olesen, 355 U.S. 371.[5]

At the outset, we wish to make it patently clear that our conclusion is not based on the particular relationships depicted in "Un Chant d'Amour." We recognize that the constitutional guarantee is not confined to the expression of ideas that are conventional or shared by a majority (Kingsley Pictures Corp. v. Regents, 360 U.S. 684 at pp. 689, 705). We think

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[4]Wherein the court held that offensive material admittedly intended to appeal to homosexuals was not obscene because the representation and descriptions did not go "substantially beyond customary limits of candor" (at p. 486).

[5]Both of these were per curiam reversals after Roth. The nature of the materials is described by brief quotations from the lower court opinions in Zeitlin v. Arnebergh, supra, footnote 22, at page 915.

there is no question that there could be an effective and dramatic film about homosexuality and sadism in prisons unaccompanied by any obscene matters (Kingsley, supra) or that a film unquestionably obscene under the applicable standard may not be so when limited to an audience of specialists (cf. United States v. 31 Photographs, Etc. (S.D.N.Y. 1957) 156 F. Supp. 350).

But from the fact that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, "it does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems" (Burstyn, supra, at pp. 502-503).

Furthermore, we think that the constitutional protection afforded does not mean that the visual impact of a motion picture as distinguished from other media can be disregarded. Films are obviously different from other forms of expression (Freedman v. Maryland, 380 U.S. 51, at p. 61). The significance of the motion picture medium is due to the technological features of the particular medium. The unique combination of sight and sound that characterizes a motion picture makes the ideas presented by movies comprehensible to a larger audience than is the case in any other medium except television (see materials cited in 60 Yale L.J. 696, fns. 27 and 28, at pp. 707-708, and 42 Cal.

L. Rev., 122, fn. 53, at p. 128). Even in the absence of sound, movies assure a high degree of attention and retention. The focusing of an intense light on a screen and the semi-darkness of the room where distracting ideas and suggestions are eliminated contribute to the forcefulness of movies and their unique effect on the audience (60 Yale L.J., supra, at p. 708).

Because of the nature of the medium, we think a motion picture of sexual scenes may transcend the bounds of the constitutional guarantee long before a frank description of the same scenes in the written word. We cannot here disregard the potent visual impact of the movie in depicting acts of male masturbation, fellatio, oral copulation, voyeurism, nudity, sadism and sodomy without any clear reference or relation to a dominant theme. We conclude that measured in terms of the sexual interests of *its intended and probable recipient group* (Mishkin v. New York, 383 U.S. 502, 509-510) or to the average person, applying contemporary standards, the predominant appeal of the film taken as a whole is to the prurient interest.[6]

We turn next, therefore, to the more difficult and delicate question of whether there is present in the film any matter of social importance (including artistic merit) that would, as appellant argues, recover for the film its protection as a constitutionally protected utterance (Zeitlin v. Arnebergh, supra, at p. 920).

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[6]We note that appellant concedes that the U. S. Court's rejection of an "average man" prurient appeal test in Mishkin undercuts a substantial portion of his argument.

The fact that the writer, director and producer of the film, Jean Genet, is a French writer of renown does not, as appellant argues, settle the crucial question of whether the film contains sufficient artistic merit. Great artists can create the type of "hard-core" pornography proscribed by our statute. Often, as in Zeitlin v. Arnebergh, supra, the technical excellence and artistic merit redeem the work despite its obscene content. Unfortunately, that is not the case here. Even appellant's own literary witness admitted that the film was made at the beginning of Genet's career as a playwright and is a transitional work in his development from a novelist into a dramatist. The witness also testified that "Un Chant d'Amour" is much less complicated than his later works and is not easily recognizable as a work of Genet. The artistic merit of Genet's other works does not provide a carte blanche when he chooses to venture into the fields covered by the film. As we indicated above, the technical aspects of the motion picture medium simply increase the burden on the artist and add a different and far more sensitive dimension.

The fact that there is no text or dialogue accompanying the film contributes to its ambiguity and the absence of a dominant theme. We think it a significant indication of the film's failure that none of the witnesses produced could agree on its dominant theme.[1] We note that in Jacobellis, supra, in holding

[1]Some suggested the effect of isolation and imprisonment upon both prisoners and guards; another, an attempt at penal improvement; others, a comment on the isolated human condition and the difficulties of human contact.

that the film "The Lovers" was not obscene, the court had no problem of ascertaining the theme or plot of the film. The same clear indication of a particular story line along with the artistic necessity of the objectionable scenes was present in the decisions upholding the film "Lady Chatterly's Lover" (Kingsley, supra) and "Anatomy of a Murder" (Columbia Pictures Corporation v. City of Chicago (N.D. Ill. 1959) 184 F.Supp. 817). A plot and some attempt at character development was apparently also clearly discernible in Times Film Corporation v. City of Chicago, supra, and One, Inc. v. Olesen, supra.

Here, the erotic scenes recur with increasing intensity and without direction toward any well-defined, wholesome idea, through scene after scene. The various sexual acts are graphically pictured or emphatically suggested with nothing omitted except those sexual consummations which are plainly suggested but meaningfully omitted and thus by the very fact of omission emphasized. If the film was intended as an artistic portrayal, it clearly failed in its endeavor. The fantasy portions of the film portray purely physical acts of increasing intensity without any contribution to character or plot development.[8] Significantly, it was

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[8]The presentation of most of the erotic material in the fantasy scenes is significant. As one eminent authority, the noted anthropologist, Margaret Mead, stated: "We may define pornography, cross-culturally, as words or acts or representations that are calculated to stimulate sex feelings independent of the presence of another loved and chosen human being. *The character of the daydream as distinct from reality is an essential element in pornography.* True, the adolescent may take a description of a real event and turn it into a daydream, the vendor of pornography

the very absence of such treatment of sex that led our Supreme Court to conclude that "Tropic of Cancer" was not the hard-core pornography proscribed by section 311, subdivision (a), of the Penal Code (Zeitlin v. Arnebergh, supra, p. 922). In our opinion, the production does nothing more than depict a number of disjointed scenes treating sex in a shocking, morbid and shameful manner and is devoid of artistic merit.

However, as Kingsley pointed out, the constitutional guarantee does not extend only to materials artistically expressed. We are left, therefore, with the question of whether the film contains any other concepts of redeeming social importance. As indicated, the fact that the film is silent and there is no text or explanation to accompany it, contributes to its ambiguity. Precisely because of this ambiguity and lack of ascertainable dominant theme, the film is clearly not a documentary of prison life or a scientific study of prison psychology. While some of appellant's witnesses indi-

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may represent a medical book as full of daydream material, but the material of true pornography is compounded of daydreams themselves, composed without regard for any given reader or looker, to stimulate and titillate. It bears the signature of non-participation—of the dreaming adolescent, the frightened, the impotent, the bored and sated, the senile, desperately concentrating on unusualness, on drawing that which is not usually drawn, writing words on a plaster wall, shifting scenes and actors about, to feed an impulse that has no object: no object either because the adolescent is not yet old enough to seek sexual partners, or because the recipient of the pornography has lost the precious power of spontaneous sexual feeling." (Mead, *Sex and Censorship in Contemporary Society*, New World Writing, Third Mentor Selection 18 (1953) quoted in Lockhart and McClure, The Law of Obscenity and the Constitution, 38 Minnesota Law Review, 295, fn. 182 at pp. 321-322, emphasis supplied.)

cated that the film might reflect on the need for prison reform, all agreed that it should not be shown on television or in a commercial motion picture theatre except possibly with other documentaries.[9] Dr. Diamond stated: "Like anything else, if it were handled indiscriminately, carelessly, for commercial purposes, I think it might be very bad. Q. So it would lose its effectiveness in your opinion if it were shown indiscriminately? A. I don't think it would lose its effectiveness for certain groups of people, but the effect on other groups might outweigh its effectiveness and is not the only device available for prison reform." Dr. Merrifield also agreed that the film could be harmful.

The record indicates that the film, although shown to an audience somewhat more limited than the general motion picture audience, was commercially exploited and appellant earned substantial amounts from its exhibitions in the Bay Area. Applying the criteria recently set forth in Ginzburg v. United States, supra, we are, therefore, further propelled toward the conclusion that it is utterly without redeeming social importance and that it meets all of the requirements set forth in section 311, subdivision (a), of the Penal Code. As Mr. Justice Stewart noted in Jacobellis v. Ohio, supra, at page 197, hard-core pornography is hard to define but he "knew it when he

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[9]As the Federal Government has occupied the field of radio and television to the exclusion of the states (Allen B. Dumont Laboratories v. Carroll (3d Cir. 1950) 184 F.2d 153), this testimony is not pertinent except as an indication that the film was suitable only for a limited audience.

saw it." We think we have seen it in "Un Chant d'Amour." It is nothing more than hard-core pornography and should be banned.

The judgment is affirmed.

Taylor, J.

We Concur:

Shoemaker, P. J.

Agee, J.

Filed October 24, 1966,
Lawrence R. Elkington, Clerk.

## Appendix C

### WORKS BY JEAN GENET

**(Titles preceded by an asterisk have been translated into English by Bernard Frechtman and published by Grove Press.)**

**Notre-Dame-des-Fleurs,* Monte Carlo, n.p., 1944; Décines, Isère, 1948. English version is entitled *Notre Dame des Fleurs.*

*Chants secrets* ("le Condamné à mort," "Marche funèbre"), 1 lithograph by Emile Picq, Lyons, l'Arbalète, 1945.

**Miracle de la rose,* Lyons, l'Arbalète, 1946. English version is entitled *Miracle of the Rose.*

**Pompes funèbres,* Bikini, 1947; revised and corrected edition, 1948. English version is entitled *Funeral Rites.*

**Querelle de Brest,* clandestine edition, n.p., n.d.; edition with 29 original lithographs (by Jean Cocteau?), Milan, n.p., 1947; new edition, n.p., 1947. English version is entitled *Querelle of Brest.*

**les Bonnes* (first version), Lyons, l'Arbalète, 1947; *Revue* l'Arbalète, no. 12, 1948; both versions, Sceaux, J.-J. Pauvert, 1954. English version is entitled *The Maids.*

**Haute Surveillance,* Paris, Gallimard, 1947-1949. English version is entitled *Deathwatch.*

**Journal du voleur,* Paris, Gallimard, 1948. English version is entitled *Thief's Journal.*

*Poèmes* ("le Condamné à mort," "la Galère," "la Parade," "un Chant d'amour," "le Pêcheur du Suquet"), Lyons, l'Arbalète, 1948; Décines, Isère, 1962.

**l'Enfant criminel* and *'Adame Miroir*, Paris, Paul Morihien, 1949. English version of *l'Enfant criminel* is entitled *The Criminal Child.*

*Oeuvres complètes*, Vol. II (*Notre-Dame-des-Fleurs*, "le Condamné à mort," *Miracle de la rose*, "un Chant d'amour"); Vol. III (*Pompes funèbres*, "le Pêcheur du Suquet," *Querelle de Brest*), Paris, Gallimard, 1953.

**le Balcon*, 1 lithograph by Alberto Giacometti, Décines, Isère, 1956; new revised edition with a preface, 1960. English version is entitled *The Balcony.*

**les Nègres*, Décines, Isère, 1958; new edition with 33 photographs of the original production, 1960. English version is entitled *The Blacks.*

*l'Atelier d'Alberto Giacometti, les Bonnes* (followed by a letter) *l'Enfant Criminel, le Funambule*, Décines, Isère, 1958.

**les Paravents*, Décines, Isère, 1961. English version is entitled *The Screens.*

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Several articles in the Genet-Ionesco issue of the *Tulane Drama Review,* Spring, 1963.

Several articles in the New French Dramatists issue of *Yale French Studies,* Number 29, 1962.